



## CZECH VIEWS OF THE DIVISION OF COMPETENCIES IN THE ENLARGED EU

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### Division of competencies – part of the EU Basic Treaty

The authors of this paper draw on the assumption that the European Union **will not be a federation** - at least not **in a short-term horizon** - but an entity *sui generis*, i.e. of its own kind. Its functioning will be governed by the Basic Treaty on the European Union. The new consolidated EU treaty shall unite all the three existing European Communities as well as the three pillars of the EU. It shall create a sole entity – the European Union - with a clearly articulated legal personality in international as well as internal affairs.

The Basic Treaty, deriving from the current treaty framework, shall cover the following domains:

1. Definition of EU citizenship with a catalogue of rights arising thereof. This document shall resemble the Charter of Fundamental Rights of the EU or be ideally based on the Charter itself, as declared by the EU Member States at the European Council in Nice.
2. EU catalogue of competencies, i.e. vertical delimitation of powers between the EU and EU Member States.
3. Horizontal delimitation of powers, i.e. among the individual EU institutions and bodies, including what kind of regulation they can issue and by what procedures.
4. Mechanisms for amendments of the Basic Treaty
5. Other provisions. This could include individual sectoral policies or specific actions. They can be provided for, however, in a separate protocol dealing with implementation issues. This scenario is supported by the authors of this paper – as outlined in point D of this paper.

### Vertical delimitation of powers

The vertical division of competencies between the EU and Member States will be set forth at three levels:

- a) domains within an **exclusive competence of the EU**. It is necessary to bear in mind that in these areas the **subsidiarity principle will not be applicable** as the EU Member States will transfer all the decision-making powers to the Union level, except areas subject to re-nationalisation by EU Basic Treaty amendments. The actual list of domains where the EU

will have exclusive competencies is subject to intensive discussions (for example the proposal of Mr Lamassour, MEP) and are not dealt with by this paper in order to keep it brief.. The authors would like to refer to analysis that has been already undertaken in this field, namely the study of T. Fischer and N. Schley: “*Organising a Federal Structure of Europe: An EU Catalogue of Competencies*”. This study is based on a detailed cost-benefit analysis of management of each policy at the level of the EU, Member States or lower entities (regions, municipalities). Further, this topic will be subject to intensive discussions in the course of the forthcoming IGC in 2004. The authors assume that the EU-managed policies should include at least **common trade policy** (including common external tariff), **common monetary policy** (with respect to special position of countries outside the EMU), **internal market regulation**, **common visa, asylum and immigration policy including the Schengen acquis**, **co-ordination of instruments of police and judicial co-operation in criminal matters**.

- b) **Domains of shared competencies between the EU and Member States.** This is a key area where the **subsidiarity** principle will apply. It must be **defined clearly**, including the sanctions in case of its violation. These mechanisms could include:
- preliminary control of adherence to the subsidiarity principle by the political bodies of the Member States (national parliaments) or EU bodies (Upper chamber of the European Parliament, further refer to point C.)
  - subsequent control of EU legal rules, in concrete terms the possibility of invalidation of such an act by the ECJ for the violation of the subsidiarity principle where the right of initiating this procedure would be vested even with the Member States (e.g. national parliaments, national governments)

In connection with this, it is necessary to develop a **new mechanism of application of the so-called supplementary powers** of the European Union, at present defined in Article 308 of the EC Treaty. This provision seems rather obsolete – it was used mainly before the adoption of the Single European Act and the adoption of the internal market. The redefinition of this article would justify the **use of supplementary EU powers only in exceptional cases**. In case the EU institutions intend to make use of this article/principle, it should be subject to a particular authorisation procedure, e.g. an unanimous assent of the European Council upon request of the European Commission.

- c) **Domain of exclusive competencies of EU Member States.** This delimitation seems necessary for the purpose of conciliating the public at large and eurosceptic groups in the individual Member States. Further it concerns preventing fears of “ever-penetration” of European integration into areas deemed as strongholds of national sovereignty. It is **necessary to identify these domains in the Basic Treaty**. These could include e.g. the **constitutional systems of the EU Member States, regulation of official languages in the Member States and other nation-state related matters, the systems of public administration, education, health care, social security** etc. The subsidiarity principle does not apply here either as it is the Member States who determine themselves at what level it is most efficient to take individual regulation.

This delimitation, however, does not exclude, *de lege ferenda*, the transfer of individual competencies from one group to another. This could be done in two ways:

- by **amending the EU Basic Treaty** in compliance with mechanism envisaged therein

- by means of **closer co-operation** with a view of higher effectiveness in a particular field (e.g. co-ordination of educational programmes at EU level). Obviously, this transfer of competencies will be possible only “upwards”, i.e. from a lower level to a higher level (shared or union) and only when complying with strictly foreseen conditions for the adoption of closer co-operation which are not dealt with in this paper but which should definitely form a part of EU Basic Treaty.

An idea that the authors would like to propose here is also that part of the vertical delimitation of powers should also be a **formalisation of Commission communications**. These although being non-binding, rather internal instruments, have a substantial impact on the behaviour of both member states as well as other entities (corporations, individuals). It would be worth considering introducing a certain “inhibitor” of the Commission in this respect, e.g. by means of a political control of the Commission (from the European Parliament – further point C.)

### **Horizontal delimitation of competencies**

This is a key area where it might turn out to be difficult to reach a consensus. The opinions concerning the division of powers among the EU bodies differ significantly – the discrepancies in speeches of some key policy-makers (Joschka Fischer, Jacques Chirac, Tony Blair, Lionel Jospin) as well as numerous political scientists might serve as an example. The last modifications are provided for in the Treaty of Nice.

The authors hold the viewpoint that it is **necessary to clarify the structure and relations between the EU institutions so that they resemble more to the traditional division of powers and in this way they become more readable for EU citizens**. That includes for example a visible separation of legislature, executive and judiciary.

*Legislative pillar of the EU:*

Represented by a **two-chamber Parliament**.

**The lower chamber would be constituted on basis of the current European Parliament.**

This chamber should be elected on basis of a **unified election system**. The best solution seems to be a two-round majority system so that the **interests of the regions would be represented at the European level**. This would, however, bring in a certain risk that not all regions would be represented equally (taking into account certain asymmetry between the mandates of bigger and smaller Member States). The role of the lower chamber will be enforced especially by introducing the **co-decision procedure to all EU legislation** (except for delegated legislation by the Commission) which would bring the idea of European Parliament **closer to the notion of a classical legislative body**.

The current state of affairs seems unjustifiable, i.e. when the European Parliament has the right to give its assent to the accession of new Member States but not to the amendments of the founding treaties. (see further point D.)

The right to dissolve the lower chamber should be **based either on its own ruling** or on the basis of an **unanimous decision of the European Council** (in the Basic Treaty it is possible to further stipulate under what circumstances this could happen).

Bigger problems can be expected to emerge with the concept of the composition of the **Upper Chamber** of the European Parliament. The authors incline towards the proposal of German Chancellor Gerhard Schröder, i.e. in favour of the **transformation of the current Council of Ministers into an Upper Chamber**. In this way, the former body would cease to exist and it would totally transform to the legislative body. Hence **the interests of the individual Member States would be represented in the Upper Chamber**.

The Upper Chamber should be a **permanent body**, however, the delegation of the representatives would be the matter of national states/governments. An optimal way seems to be the **creation of a function of “European minister”** in the individual EU Member States representing the respective country in the Upper Chamber. This person would change according to a current political situation. The expertise which rests with the Council would be maintained by advisors for the individual policy areas, possibly also aided by a stronger focus on individual policy areas at the level of the **Committee of Permanent Representatives (COREPER)**.

In the Upper Chamber, a present system of **weighted voting, possibly unanimity**, should be maintained, with a view of protection of smaller EU Member States. The question of precise determination of these procedures will be a matter either of the Basic Treaty, or possibly another protocol (resembling an implementing treaty) subject to a simplified amendment procedure.

#### *Executive:*

**The European Commission will remain the executive body at the EU level.** The functioning of the Commission will depend on the **vote of confidence by the Lower Chamber** of the European Parliament. This is however, not possible to ensure legally, it is a matter of habit. A particular position within the Commission will be represented – apart from the President – by the **Commissioner for External Relations** who as the sole representative would represent the EU in the external affairs. This would mean that the present post of High Representative will not exist any more. The Commissioner for External Relations could be – as well as the President – **appointed directly by the European Council**.

According to the authors, the Commission **does not necessarily have to be the only institution with the exclusive right to initiate EU legislation**. This power could be vested both in the Lower and the Upper Chambers on basis of a certain quorum. The Commission would, however, have the chance to issue opinions in respect to such proposals. If negative, the quorums in both Chambers would be even stricter (absolute majority in the Lower Chamber, unanimity in the Upper Chamber). The initiative of legislation could be vested even in the Member States according to their constitutional provisions (which could set forth e.g. the admissibility of the proposals of governments, national parliaments or possibly other bodies).

#### *Collective Head of the EU:*

**The European Council would be maintained**, however, the **presidency would be cease to exist in its present form** and the **President of the European Council would become President of the Commission in one person**. The European Council will appoint the President as well as the Commissioner for External Relations. The President will then appoint the individual Commissioners and the whole college would be subject to a vote of confidence by the Lower Chamber of the EP.

The European Council would *de facto* fulfil the role of a collective head of the EU, suggesting the Commission's strategy and giving her political guidelines. Based on this presumption, the **European Council should meet more frequently**, about once in a month in Brussels as stipulated by the Treaty of Nice.

*Judiciary:*

**The judicial power at the EU level would be represented by the European Court of Justice**, with the same catalogue of competencies as nowadays. In connection with the vertical delimitation of powers highlighted in point B, one of the foremost tasks of ECJ will be that of the **guardian of subsidiarity principle**, with the power to proclaim those EU acts contrary to this principle null and void. It will function in parallel as a "constitutional court", guarding the adherence to the division of competencies between EU bodies and between the EU and Member States.

The only substantial change that the authors would suggest here is the **right of active legitimation for the national parliaments in the invalidation procedure before the ECJ**. This power is *de facto* vested with the national parliaments even now. Its application is, however, slightly complicated because it is the Member States (not expressly national parliaments) who can initiate such proceedings and further there is quite a limited two-month period for the initiation of this lawsuit.

### **Procedure of Amending the Basic Treaty**

Even though it is not explicitly stated in the core of this paper, the authors draw from the presumption that **the Basic Treaty will *de facto* be the EU constitution**. For this reason, the procedures prescribed for its amendments should be strict. That leads further to a question what should be the areas included in the Treaty, in other words, what would be "rigid" provisions and where on the other hand more flexibility for amendments would be desirable.

The amendments to the Basic Treaty should be agreed upon **unanimously by the European Council**. The Convention method should become a standard procedure for adopting the proposals, including as wide a range of subjects involved as possible (national parliaments, governments, EU bodies, expert public, NGOs). The **assent procedure should definitely include the approval of the amendment by the Lower Chamber of the EP as well as ratification in the individual Member States in compliance with their respective constitutional provisions**.

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*The paper has been elaborated by the working group of European Policy Forum, Europeum, composed of:*

*Lukáš Pachta*

*David Král*

*Ivo Šlosarčík*

*Radomír Špok*

*David Stulík*

*Pavel Černoch*

*Refer to the bottom of the documents for contacts.*

